

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-6173

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6173

ATLANTIC DEPARTMENT STORES, INC.,
Plaintiff-Appellee,

—v.—

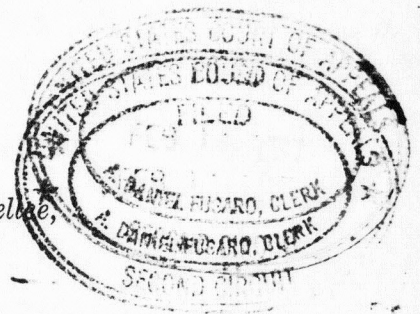
UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellant.*

KAPLAN & ABRAHAMS, ESQS.,
Attorneys for Plaintiff-Appellee.



PAGINATION AS IN ORIGINAL COPY

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JUDGE FRANKEL

C. Form No. 106 Rev.

75 GR. 42 2/4

08-1 75 4224 TITLE OF CASE 08 26 75 2 870 1 11 0845 ATTORNEYS e.v. FRANKEL, J

For plaintiff:

ATLANTIC DEPARTMENT STORES, INC.,

VS.

UNITED STATES OF AMERICA

Kaplan & Abrahams, P.C.
200 Garden City Plaza
Garden City, New York 11530
877-1122

For defendant:

U.S. ATTORNEY (X-9153)
(William R. Bronner, Asst. U.S.A.)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed X	Clerk	AUG 26 1975			
6 mailed ↙	Marshal				
Costs of Action:	Docket fee				
U.S.C. 1346 (a)(1)					
Recovery of overpayment	Witness fees				
Employer's Taxes under	IRC 3111				
Action arose at:	Depositions				
					(A)

DATE	PROCEEDINGS	Date Judgment
-26-75	(1) Filed complaint and issued summons.	
-05-75	(2) Filed summons and return - served the following: U.S. Atty. 1 St. Andrews Plaza NYC by R. Lee on 09-02-75 The Atty. General, Washington D.C. Certified Mail #162960 dated 8-2-75	
-29-75	(3) Filed ANSWER of deft. to the complaint.	(U.)
19-76	Filed defts notice of motion for judgment on the pleadings to dismiss pursuant to Rule 12(c). Ret. 5-6-76.	
4-19-76	Filed defts memo of law in support of motion to dismiss.	
4-30-76	Filed Stip & Order adjourning defts motion to dismiss the amended complt to 5-27-76. FRANKEL, J.	
-14-76	Filed plttfs affdvs & notice of cross-motion for summary judgment in favor of plttf & against deft. Ret. 5-27-76	
-14-76	Filed plttfs memo of law in opposition to defts motion & in support of plttfs motion.	
-26-76	Filed Govt's memo of law, in reply.	
-19-76	Filed Opinion #44990 & Order. On the Govt's motions for judgment on the pleadings or dismissal for failure to state a claim upon which relief can be granted & plttfs cross-motion for summary judgment, the issue is whether an employer who has paid taxes under the (FICA), in excess of the amount owed, must, before obtaining a refund for himself, apply for the same relief on behalf of his employees. For the reasons indicated, plttfs motion for summary judgment is granted & the Govt's motions are denied. the parties will settle a final judgment. n/m (TO Motion)	
8-31-76	Filed Judgment #76,799 & Order that plttf recover from the deft, the sum of \$11,636.10, with interest at 6% per annum, from the dates of the receipt by sqid deft of each overpayment by the plttf of employer's tax for the calendar year of 1974. FRANKEL, J. Judgment Ent. 8-31-76, Clerk. n/m	
14-76	Filed Stip & Order re application for refund which was made in accordance with the statutes & regulations pertaining thereto, as indicated. FRANKEL, J.	
-29-76	Filed notice of entry of Judgment #76,799.	
8-28-76	Filed defts notice of appeal to the USCA from Judgment #76,799 dtd 8-31-76. Copy sent to: Kaplan & Abrahams, 200 Garden City Plaza, Garden City, N.Y. 11530.	

B-X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

-against-

COMPLAINT

UNITED STATES of AMERICA,

Civ. #

-75

Defendant.
-----x

Plaintiff, by Kaplan and Abrahams, its attorneys,
complaining of the defendant, respectfully alleges:

FIRST: That at all the times hereinafter mentioned
plaintiff was and still is a corporation organized and existing
under the laws of the State of New York with a place of business
at 111 8th Avenue, in the Borough of Manhattan, City and State
of New York.

SECOND; That Defendant is the United States of America.

THIRD: Plaintiff brings this action against Defendant
for recovery of overpayment of employer's taxes under the Federal
Insurance Contributions Act (Internal Revenue Code §3111) for
the calendar year 1974.

FOURTH: This Court has original jurisdiction of this
action pursuant to 28 U.S.C. Section 1346 (a) (1).

FIFTH: Plaintiff duly and timely filed its returns under
the Federal Insurance Contributions Act during the calendar year
1974, with the District Director of Internal Revenue for the
district of New York, at Holtsville, New York, and duly and timely
paid the tax due shown thereon.

SIXTH: Subsequent to the filing of said return Plaintiff discovered that it had erroneously failed to exclude from wages paid to its employees, upon which such tax is based, amounts paid to employees absent from work on account of sickness.

SEVENTH: That such "sick pay" payments were made by Plaintiff under a qualified sick pay plan, and are not includable as "wages", under the Federal Insurance Contributions Act (Internal Revenue Code, Section 3121 (a) (2)).

EIGHTH: That on or about June 16, 1975, Plaintiff filed a claim for refund to the District Director of Internal Revenue at Holtsville, New York for overpayment of employer tax paid by it under the Federal Insurance Contributions Act (Internal Revenue Code §3111) for the calendar year 1974 in the amount of \$11,636.10, plus statutory interest; that copy of said claim for refund is annexed hereto as exhibit A. (Supporting schedules omitted).

NINTH: That on or about July 10, 1975, Plaintiff received notice of the rejection of said claim for refund; that a copy thereof is annexed hereto as Exhibit B.

TENTH: Defendant by such rejection, erroneously and improperly disallowed such claim on the basis that plaintiff omitted from its claim for refund certain statements allegedly required by Internal Revenue Code 3101 and Revenue Regulation 31-6402(a).

ELEVENTH: That said regulation requires such statements where refund is sought of overpayment of Employee Tax under Federal Insurance Contributions Act (Internal Revenue Code 3101) but not required for refund of employer tax under such statute (Internal Revenue Code §3111).

That by virtue of foregoing defendant became indebted to plaintiff in the amount of \$11,636.10, for overpayment of employer's tax for 1974 under Federal Insurance Contributions Act (Internal Revenue Code § 3111).

WHEREFORE, Plaintiff demands judgement against defendant in the amount of \$11,636.10, with statutory interest and costs of this action.

Dated: Garden City, New York
August 21, 1975

KAPLAN & ABRAHAMS, ESQS.

by: 

ABRAHAM KAPLAN
member of the firm

200 Garden City Plaza
Garden City, New York

516-877-1111

843

Claim A 6

Use only if the taxpayer is an individual

For Internal Revenue Service Use Only

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected
- ☐ Refund of Amount Paid for Stamps Overpaid, or Used in Error or Excess
- ☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes)

Name of taxpayer or purchaser of claim
Atlantic Department Stores
Number and street
111 8th Avenue
City or town, State, and ZIP code
New York, N.Y. 10011

Fill in applicable items—Use attachments if necessary

a. Your social security number
b. Spouse's number, if joint return
c. Employer identification number (if any)
13-2684080

d. Internal Revenue Service office where return (if any) was filed
1040 Waverly Avenue, Holtsville, N.Y.

e. Name and address shown on return, if different from above

f. Period for which tax is reported on original return
From January 1, 1974, to December 31, 1974
g. Kind of tax
F.I.C.A.

h. Amount of assessment
\$

i. Date of payment

j. Tax stamps (if purchased from Gov. agent)

k. Amount to be refunded (if income tax, complete computation below)
\$ 11,636.10

l. Amount to be abated (not applicable to income, estate, or gift taxes)
\$

m. The claimant believes that the claim is due for the following reasons:

The taxpayer erroneously reported Social Security Taxable wages for each employee without excluding the amounts for being absent from work on account of sickness. These "Sick Pay" payments were made under a qualified sick pay plan as required by F.I.C.A. As a result, the Social Security tax was overpaid (\$198,907.63 x 5.85% = \$11,636.10). See attached schedule.

Computation of Income Tax Refund

- 1 Tax withheld
- 2 Estimated tax paid
- 3 Tax paid with original return
- 4 Any additional income tax paid
- 5 Total tax paid (add lines 1-4)
- 6 Less: Your computation of correct tax
- 7 Amount of overpayment
- 8 Amount previously refunded
- 9 Net overpayment (enter in item 1 above)

Income Tax

I hereby declare under penalty of perjury that I have examined the foregoing computation, schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete

Signed Robert Epstein
Vice President & Treasurer

Dated June 16, 1975

See instructions on reverse

Form 843 (Rev. 7-73)

EXHIBIT A

BEST COPY AVAILABLE

Internal Revenue Service Center
North-Atlantic Region TAB: 156:DS

Department of the Treasury

JUL 10 1975

Date:

Atlantic Department Stores
111 8th Avenue
New York, NY 10011

Social Security or
Employer Identification Number:

13-2684080

Document Locator Number:

13141-046-07011-5

Kind of Tax:

FICA

Tax Period Ended:

Dec. 31, 1974

Amount Claimed: \$11,636.10

Date Claim Received:

June 17, 1975

Service Center Telephone Number:

CERTIFIED MAIL - 627904

We are sorry, but we cannot allow the above claim for an adjustment of your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims, 717 Madison Place N.W., Washington, D.C. 20005. The law permits you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you have any questions and wish to write us, please use the address shown on this letter. Our telephone number is shown in the heading of this letter if you want to call us. There will be a long distance charge to you if you are beyond the immediate dialing area of the service center (you can check with your local telephone operator).

Sincerely yours,

Henry B. Seufert

Director, Service Center

Reasons for disallowance: Every claim filed by an employer shall include a statement that the employer has repaid the tax to such employees or has secured the written consent of such employees to allowance of the refund. (2) Every claim filed by an employer for refund shall include a statement that the employer has obtained from the employees a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount. The employer shall retain the employees written statement as part of the employer's records. The above statements are in accordance with Section 3101 paragraph 6402 (a) of the Internal Revenue Code.

P.O. Box 700, Holtsville, N.Y. 11742

Form RSC-100 (Rev. 7-74)

EXHIBIT B

8 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 10-29-75
S.D. of NEW YORK

ATLANTIC DEPARTMENT STORES, INC., :

Plaintiff, :

ANSWER

-v-

: 75 Civ. 4224 (MEF)

UNITED STATES OF AMERICA, :

Defendant. :

Defendant the United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the complaint herein, alleges:

1. Admits the allegations of paragraphs SECOND, THIRD, FOURTH, FIFTH, EIGHTH, and ELEVENTH of the complaint, and the allegation in paragraph TENTH that the stated reason for the denial of plaintiff's claim was that certain allegedly required statements were not attached.

2. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs FIRST, SIXTH, SEVENTH, and NINTH of the complaint.

3. Denies the allegation of paragraph TENTH of the complaint that the disallowal of plaintiff's claim was erroneous or improper.

FIRST DEFENSE

4. The only costs of this action which plaintiff may recover if successful are Court and related fees; other costs, including attorneys' fees and expenses, are not recoverable.

SECOND DEFENSE

5. The denial of the claim for refund, although for an improper stated reason, was proper in fact.

WHEREFORE, defendant demands judgment that the complaint be dismissed with prejudice, together with costs of this action.

Dated: New York, New York

October 28, 1975.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for defendant
United States of America

William Roche Bronner
By: _____
WILLIAM R. BRONNER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9153

WRB:lm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF MOTION

75 Civ. 4224 (MEF)

U.S. DISTRICT COURT

FILED

S.D. of NEW YORK

PLEASE TAKE NOTICE, that upon the annexed

memorandum of law, and upon the pleadings heretofore filed herein, including the stipulation in letter form annexed hereto, defendant, the United States of America, by its attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, will move this court on Thursday, May 6, 1976, before Honorable Marvin E. Frankel, United States District Judge, at the United States Courthouse Foley Square, New York, New York, at 10:00 a.m., or as soon thereafter as counsel can be heard, for judgment of dismissal on the pleadings, and in the alternative, for judgment dismissing the amended complaint for failure to state a claim upon which relief can be granted, pursuant to Rules 12(c) and 12(b)(6), Fed. R. Civ. P.

Dated: New York, New York
April 16, 1976.

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant.

A 11

By: William Roche Brenner

WILLIAM R. BRENNER
Assistant United States Attorney
United States Attorney's Office
1 St. Andrews Plaza
New York, New York 10007
Tel.: (212) 791-9153

WRB:lm

TO: ABRAHAM KAPLAN, ESQ.
Kaplan & Abraham
200 Garden City Plaza
Garden City, N.Y. 11530

A 12

KAPLAN & ABRAHAM
COUNSELORS AT LAW
200 GARDEN CITY PLAZA
GARDEN CITY, N. Y. 11530

(516) 877-1122

(212) 895-3040

ABRAHAM KAPLAN
RICHARD N. ABRAHAM

Mr. Bronner
75-2931
DEC 11 PM 1:41

S. D. N. Y.

December 10, 1975

William Roche Bronner, Esq.,
Assistant United States Attorney,
United States Courthouse Annex
One St. Andrew's Plaza,
New York, N.Y. 10007

Re: Atlantic Department Stores, Inc.
vs. United States of America

Dear Mr. Bronner:

Confirming our telephone conversation last Friday, it is agreed between us that the pleadings herein shall be deemed amended:

(a) by numbering as Paragraph TWELFTH the paragraph on the third page of the complaint which has no number, and

(b) deeming Paragraph 3 of the Answer to read:

"3. Denies the allegations of Paragraph TENTH of the complaint, that the disallowal of plaintiff's claim was erroneous or improper, and the allegations of Paragraph TWELFTH that defendant is indebted to plaintiff."

Kindly consent to the foregoing by signing the copy of this letter enclosed for such purpose.

May I hear from you as soon as you have received word from the I.R.S. about its on-going investigation of the propriety of plaintiff's claim for refund.

Please accept my thanks for your cooperation.

Very truly yours,

[Signature]
ABRAHAM KAPLAN

AK:JW
ENC.S.

E. BRONNER

- 2931

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF CROSS-
MOTION

75 Civ.4224 (MEF)

-----x

PLEASE TAKE NOTICE that on the 27th day of May, 1976 the adjourned return date of Motion made by the defendant for judgment on the pleadings, or, in the alternative, for judgment dismissing the amended complaint for failure to state a claim upon which relief may be granted, the undersigned, upon the annexed affidavits of ROBERT EPSTEIN, sworn to the 6th day of May, 1976 and EDWARD FOYER, sworn to the 7th day of May, 1976, will cross-move before Honorable Marvin E. Frankel, United States District Judge at the United States Courthouse, Foley Square, New York, New York, at 10 A.M. in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of the plaintiff and against the defendant, for the relief demanded in the complaint, on the ground that there are no genuine issues as to any material fact

and that plaintiff is entitled to judgment as a matter of law, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Garden City, New York
May 11, 1976

Yours etc.,

KAPLAN & ABRAHAMS, Esqs.,
Attorneys for Plaintiff
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530
Tel: (212) 895-3040

TO: ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

BY: WILLIAM R. BRONNER
Assistant United States Attorney
United States Attorney's Office
1 St. Andrews Plaza,
New York, New York 10007
Tel: (212) 791-9153

By [Signature]
For the firm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

- against -

75 Civ.4224 (MEF)

UNITED STATES OF AMERICA,

Defendant
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

ROBERT EPSTEIN, being duly sworn, deposes and says:

1. That until September, 1975, your deponent was Vice-President and Treasurer of Atlantic Department Stores, Inc., under whose supervision tax returns of that corporation were prepared and filed.

2. That deponent makes this affidavit in opposition to the defendant's motion to dismiss the plaintiff's complaint on the pleadings, or for insufficiency and in support of plaintiff's cross-motion for summary judgment pursuant to Rule 56 (a).

3. That your deponent was employed by the plaintiff for approximately nine years and as an officer of the plaintiff corporation, occupying the offices, as aforesaid.

4. That when your deponent was first employed, he was advised that plaintiff had in force a Qualified Sick Pay Plan under which it paid wages to its employees, who were absent from work on account of sickness.

5. That your deponent knows of his own knowledge that

this Plan was in effect during the year 1974.

6. That during the year 1974 the taxes which accrued under Federal Insurance Contributions Act (hereafter F.I.C.A.) (26 U.S.C. §§3101 et seq), were prepared, filed and the taxes paid on total wages, without deducting sick pay paid to employees absent on account of sickness.

7. That thereafter the tax returns filed by the plaintiff corporation for the year 1974 were audited by Edward Foyer, an employee of Reed, Roberts Associates, Inc., a tax advisory service engaged by the plaintiff, and Foyer thereafter informed your deponent that plaintiff had overpaid its taxes under F.I.C.A. by failing to deduct sick pay payments made during the year to its employees absent on account of sickness, which are not includable as "wages" under the statute.

8. That your deponent thereupon and on or about June 16, 1975, caused plaintiff to file a claim for refund with the District Director of Internal Revenue, at Holtsville, New York, for such overpayment, for the calendar year 1974, which had been determined to be \$11,636.10, plus statutory interest.

9. That this claim was rejected by the Internal Revenue Service on or about July 10, 1975, on the basis that plaintiff had omitted from its claim for refund certain statements allegedly required by Internal Revenue Code §3101, and Revenue Regulation 31-6402 (a).

10. A copy of the Notice of Rejection by the Internal Revenue Service is annexed hereto as Exhibit "A".

11. That your deponent is informed and verily believes that Revenue Regulation 31-6402 requires the statements to which the Internal Revenue Service refers where refund is sought of overpayment of employee taxes (I.R.C §3101), but not required for refund of employer's taxes (I.R.C. §3111).

12. That a Memorandum of Law supporting the plaintiff's position is being served simultaneously with these papers, and will be before the Court at the time of the hearing of this motion.

WHEREFORE, your deponent prays that the defendant's motion to dismiss the complaint on the pleadings, or for insufficiency, be denied, and that plaintiff's cross-motion for summary judgment for the relief demanded in the complaint be granted, pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure.

ROBERT EPSTEIN

Sworn to before me this

_____ day of May, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

- against -

75 Civ.4224 (MEF)

UNITED STATES OF AMERICA,

Defendant.
-----x

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

EDWARD FOYER, being duly sworn, deposes and says:

1. That he is an auditor employed by Reed, Roberts Associates, Inc., which is engaged in the Unemployment Insurance Advisory Service, and which was under contract with the plaintiff in the above entitled action, to render said services.

2. That in connection with the audit of the Federal Insurance Contributions Act (F.I.C.A.) Tax returns of the plaintiff for the year 1974, your deponent became aware and reported to Robert Epstein, Vice President and Treasurer of the plaintiff corporation, that the plaintiff had overpaid the employer's tax imposed by Internal Revenue Code §3111, in that it had failed to exclude from taxable wages, the sick pay which it had paid to its employees absent by reason of illness, under a Qualified Sick Pay Plan.

3. That your deponent was thereupon requested to prepare and submit to the said Robert Epstein, as an officer of

the plaintiff corporation, for execution, claim for refund for overpayment of employer's tax for the calendar year 1974. (Internal Revenue Code §3111), which your deponent upon said audit, determined to be the sum of \$11,636.10.

4. That your deponent assisted in the preparation of the claim for refund and was thereafter advised by the said Robert Epstein that the same had been filed with the District Director of Internal Revenue at Holtsville, New York, and that subsequently the said claim had been rejected for reasons which your deponent has been informed are erroneous.

EDWARD FOYER

Sworn to before me
this ____ day of May,
1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

-against-

COMPLAINT

UNITED STATES of AMERICA,

Defendant.

75 Civ. # 4224
(MEF)

-75

-----x
Plaintiff, by Kaplan and Abrahams, its attorneys,
complaining of the defendant, respectfully alleges:

FIRST: That at all the times hereinafter mentioned
plaintiff was and still is a corporation organized and existing
under the laws of the State of New York with a place of business
at 111 8th Avenue, in the Borough of Manhattan, City and State
of New York.

SECOND; That Defendant is the United States of America.

THIRD: Plaintiff brings this action against Defendant
for recovery of overpayment of employer's taxes under the Federal
Insurance Contributions Act (Internal Revenue Code §3111) for
the calendar year 1974..

FOURTH: This Court has original jurisdiction of this
action pursuant to 28 U.S.C. Section 1346 (a) (1).

FIFTH: Plaintiff duly and timely filed its returns under
the Federal Insurance Contributions Act during the calendar year
1974, with the District Director of Internal Revenue for the
district of New York, at Holtsville, New York, and duly and timely
paid the tax due shown thereon.

DENIES KNOW-
LEDGE &
INFORMATION

SIXTH: Subsequent to the filing of said return Plaintiff discovered that it had erroneously failed to exclude from wages paid to its employees, upon which such tax is based, amounts paid to employees absent from work on account of sickness.

DENIES KNOW-
LEDGE &
INFORMATION

SEVENTH: That such "sick pay" payments were made by Plaintiff under a qualified sick pay plan, and are not includable as "wages", under the Federal Insurance Contributions Act (Internal Revenue Code, Section 3121 (a) (2)).

ADMITTS

EIGHTH: That on or about June 16, 1975, Plaintiff filed a claim for refund to the District Director of Internal Revenue at Holtsville, New York for overpayment of employer tax paid by it under the Federal Insurance Contributions Act (Internal Revenue Code §3111) for the calendar year 1974 in the amount of \$11,636.11 plus statutory interest; that copy of said claim for refund is annexed hereto as exhibit A. (Supporting schedules omitted).

DENIES KNOW-
LEDGE &
INFORMATION

NINTH: That on or about July 10, 1975, Plaintiff received notice of the rejection of said claim for refund; that a copy thereof is annexed hereto as Exhibit B.

DENIES DIS-
ALLOWANCE
ERRONEOUS OR
IMPROPER, BUT
ADMITTS THAT
REASONS THERE-
FOR ARE AS
STATED

TENTH: Defendant by such rejection, erroneously and improperly disallowed such claim on the basis that plaintiff omitted from its claim for refund certain statements allegedly required by Internal Revenue Code 3101 and Revenue Regulation 31-6402(a).

ADMITTS

ELEVENTH: That said regulation requires such statements where refund is sought of overpayment of Employee Tax under Federal Insurance Contributions Act (Internal Revenue Code 3101) but not required for refund of employer tax under such statute (Internal Revenue Code §3111).

DENIES

* TWELFTH: That by virtue of the foregoing defendant became indebted to plaintiff in the amount of \$11,636.10, for overpayment of employer's tax for 1974 under Federal Insurance Contributions Act (Internal Revenue Code §3111).

WHEREFORE, Plaintiff demands judgment against defendant in the amount of \$11,636.10, with statutory interest and costs of this action.

Dated: Garden City, New York
August 21, 1975

KAPLAN & ABRAHAMS, Esqs.

BY: _____

ABRAHAM KAPLAN,
member of the firm
200 Garden City Plaza,
Garden City, New York 11530

516-877-1122

*Deemed amended as per letter, dated December 10, 1975
copy of which is annexed to defendant's moving papers.

Claim

A 23

For Internal Revenue Service Use Only

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected
☐ Refund of Amount Paid for Stamps Used, or Used in Error or Excess
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes)

Name of taxpayer or purchaser of stamps
Atlantic Department Stores
 Number and street
111 8th Avenue
 City or town, State, and ZIP code
New York, N.Y. 10011

Fill in applicable items--Use attachments if necessary

a. Your social security number _____ Spouse's number, if joint return _____ b. Employer identification number (if any)
13-2684080

c. Internal Revenue Service office where return (if any) was filed
1040 Waverly Avenue, Holtsville, N.Y.

BEST COPY AVAILABLE

d. Name and address shown on return, if different from above

e. Period for which refund is reported on annual basis (jump to separate form for each taxable year)
 From January 1, 19 74, to December 31, 19 74 f. Kind of tax
F.I.C.A.

g. Amount of assessment
\$ h. Amount to be refunded (if income tax, complete computation below)

h. If stamps were purchased from Gov. agent

\$ 11,636.10

i. Amount to be abated (not applicable to income, estate, or gift taxes)
\$

k. The claimant believes that the claim should be allowed for the following reasons:

The taxpayer erroneously reported Social Security Taxable wages for each employee without excluding the amounts for being absent from work on account of sickness. These "Sick Pay" payments were made under a qualified sick pay plan as required by F.I.C.A. As a result, the Social Security tax was overpaid (\$198,907.63 x 5.85% = \$11,636.10). See attached schedule.

Computation of Income Tax Refund

Income Tax

- 1 Tax withheld
- 2 Estimated tax paid
- 3 Tax paid with original return
- 4 Any additional income tax paid
- 5 Total tax paid (add lines 1-4)
- 6 Less: Your computation of correct tax
- 7 Amount of overpayment
- 8 Amount previously refunded
- 9 Net overpayment (enter in item 1 above)

I hereby certify, under penalty of perjury, that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed Robert Epstein
 Vice President & Treasurer

Dated June 16, 19 75

See instructions on reverse

Form 843 (Rev. 7-73)

EXHIBIT A

JUL 10 1975

A 24

Date:

Atlantic Department Stores
111 8th Avenue
New York, NY 10011

Social Security or
Employer Identification Number:
13-2684080

Document Locator Number:
13141-046-07011-5

Kind of Tax:

FICA

Tax Period Ended:

Dec. 31, 1974

Amount Claimed: \$11,636.10

Date Claim Received:

June 17, 1975

Service Center Telephone Number:

CERTIFIED MAIL - 627904

We are sorry, but we cannot allow the above claim for an adjustment of your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims, 717 Madison Place N.W., Washington, D.C. 20005. The law permits you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you have any questions and wish to write us, please use the address shown on this letter. Our telephone number is shown in the heading of this letter if you want to call us. There will be a long distance charge to you if you are beyond the immediate dialing area of the service center (you can check with your local telephone operator).

Sincerely, yours,

Henry B. Seufert

Director, Service Center

Reasons for disallowance: Every claim filed by an employer shall include a statement that the employer has repaid the tax to such employees or has secured the written consent of such employees to allowance of the refund. (2) Every claim filed by an employer for refund shall include a statement that the employer has obtained from the employees a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount. The employer shall retain the employees written statement as part of the employer's records. The above statements are in accordance with Section 3101 paragraph 6402 (a) of the Internal Revenue Code.

P.O. Box 700, Holtsville, N.Y. 11742

Form RSC-105 (Rev. 7-74)

EXHIBIT B

-----x
ATLANTIC DEPARTMENT STORES, INC., :

Plaintiff, :

-v- :

ANSWER

UNITED STATES OF AMERICA, :

75 Civ.4224 (MEF)

Defendant. :

-----x

Defendant the United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the complaint herein, alleges:

1. Admits the allegations of paragraphs, SECOND, THIRD, FOURTH, FIFTH, EIGHTH and ELEVENTH of the complaint, and the allegation in paragraph TENTH that the stated reason for the denial of plaintiff's claim was that certain allegedly required statements were not attached.

2. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs FIRST, SIXTH, SEVENTH and NINTH of the complaint.

*
3. Denies the allegation of paragraph TENTH and TWELFTH of the complaint that the disallowal of plaintiff's claim was erroneous or improper.

FIRST DEFENSE

4. The only costs of this action which plaintiff may recover if successful are Court and related fees; other costs, including attorneys' fees and expenses, are not recoverable.

* Deemed amended as per letter dated 12/10/75, copy of which is annexed to defendant's moving papers.

WRB:amm

SECOND DEFENSE

5. The denial of the claim for refund, although for an improper stated reason, was proper in fact.

WHEREFORE, defendant demands judgment that the complaint be dismissed with prejudice, together with costs of this action.

Dated: New York, New York

October 28, 1975.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for defendant
United States of America

By: William Roche Bronner

WILLIAM R. BRONNER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9153

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 8-13-76
-----x S.D. of NEW YORK

ATLANTIC DEPARTMENT STORES, INC.,

75 Civ.4224 (MEF)

Plaintiff,

.. against -

UNITED STATES OF AMERICA,

Defendant.

Stipulation + ORDER

-----x

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto:

1. That plaintiff is a corporation organized and existing under the laws of the State of New York, with a place of business at 111 Eighth Avenue, Borough of Manhattan, City and State of New York.

2. That on or about June 16, 1975, plaintiff filed a claim for refund with the District Director of Internal Revenue, at Holtsville, New York, for overpayment of employer tax paid by it under Federal Insurance Contributions Act. (FICA), for the calendar year 1974, in the amount of \$11,636.10, plus statutory interest.

3. That the application for refund was made in accordance with the statutes and regulations pertaining thereto, and that the amount of the overpayment claimed therein, to wit, the sum of \$11,636.10 is the amount of the overpayment of employer's tax under the FICA, for the calendar year 1974.

4. That the number of employees included in the overpayment for the year 1974 was 2,409 claimants, and that the average overpayment per claimant is the sum of \$4.83.

5. That whereas plaintiff at one time did operate as many as 102 stores, at the time of the filing of the application for refund it was operating only 21 such stores, and that of the 2409 claimants included in the application for refund of employer's tax only 11% thereof, or approximately 265 of such employees were still employed by it at the time of the filing of the said claim.

6. That to adjust the overcollection of the employees' tax (I.R.S. §3101) it would have been incumbent upon the employer:

(a) to communicate with each of the employees covered by the claim, including over 2,000 who were no longer in its employ at the time of the filing of the claim, and some of whom may have left the plaintiff more than a year prior thereto;

(b) explain to each of these employees the overdeduction and the proceedings being taken by the employer,

(c) pay to each of these employees the amount of overdeduction, obtaining a written receipt therefor, or the employee's written consent to the allowance of the refund or credit to the employer, retaining such receipt or consent among its records.

(d) as the amount of the overpayment had been collected from the employee in a prior calendar year, obtain from each employee a written statement that (i) the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (ii) that the employee will not claim refund or credit of such amount. This statement, too, must be retained among the employer's records.

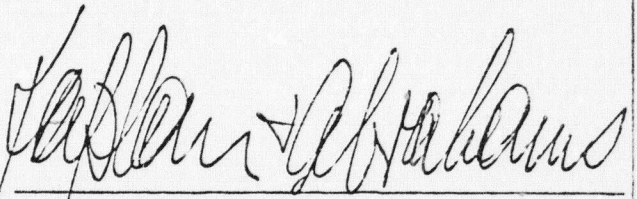
7. (a) It is estimated that as to any employees whose location is known and who is cooperative with the employer, the cost of compliance by the employer with these requirements exceeds \$2.25 a claimant, as follows:

Original investigation to determine overdeduction and quarter in which overdeduction was made:	\$1.00
Printing, stationery, mailing expense:	.80
Clerical and secretarial services:	.15
Follow up mailings:	.30
Total:	\$2.25

This does not include the expense of accounting and legal services which may be incurred.

(b) As to employees who are not readily located or who prove uncooperative, the additional expenses involved in locating them and obtaining their cooperation, added to the basic cost above, the total expense may exceed the amount of the claim.

Dated: July 29, 1976
New York, New York



Attorneys for Plaintiff

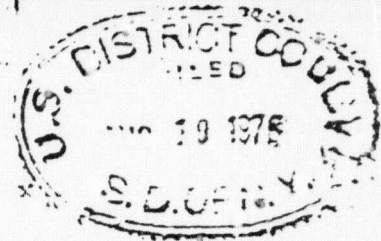
ROBERT B. Fiske, Jr.

U.S. Attorney for the Southern
District of New York,
Attorney for defendant, U.S.A.

By William R. Browne AUSA

SO ORDERED: 51 8-9-76
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

75 Civ. 4224

OPINION

44990

A P P E A R A N C E S :

Kaplan & Abrams, Esqs.
Garden City, N.Y.
Attorneys for Plaintiffs
Abraham Kaplan, Esq.

Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York
New York, N.Y.

Attorney for Defendant

William R. Bronner, Assistant United States Attorney

FRANKEL, D.J.

On the Government's motions for judgment on the pleadings or dismissal for failure to state a claim upon which relief can be granted and plaintiff's cross-motion for summary judgment, the issue is whether an employer who has paid taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. §3111, in excess of the amount owed, must, before obtaining a refund for himself, apply for the same relief on behalf of his employees. The court has concluded that there is no such duty in the circumstances of this case. Accordingly, plaintiff's motion for summary judgment will be granted and

the Government's motions denied.

I.

The relevant facts have been largely stipulated, and there are no issues as to material facts. Plaintiff corporation is an employer obligated under the FICA to pay an excise tax on the wages of its employees. In computing the amount of tax due for 1974, plaintiff mistakenly treated sick-leave payments to 2,409 of its employees as "wages." As a result, it paid \$11,636.10 more in taxes than it owed, and concomitantly the affected employees had more tax withheld from their paychecks than required. Having discovered its error, plaintiff, on or about June 16, 1975, applied for a refund in the amount of its overpayment, plus statutory interest. The claim was denied by the IRS on the ground that plaintiff had not provided certain required statements as to the steps taken to reimburse employees for the corresponding excess amounts of tax withheld from their wages and ultimately forwarded to the IRS. Claiming that it is entitled to its refund without taking any action on behalf of its employees, plaintiff filed the instant suit on August 26, 1975. The Government in its answer stated that while the denial of the refund had been "for an improper stated reason, [it] was proper in fact." The defense now pressed is that the statute and accompanying regulations should be read to require that an

employer must act as its employees' agent for the purpose of collecting credits or ^{refunds} resulting from the overpayment of FICA assessments. Failure to do so, according to the Government, requires rejection of the employer's claim.

II.

The FICA statutory scheme obligates an employer and his employees each to pay taxes in amounts equal to 5.85% of the employee's wages. 26 U.S.C. §§3101 and 3111. The employer is required to collect the tax from the employee "by deducting the amount of the tax from the wages of the employee as and when paid." Id. §3101. For the purpose of calculating the appropriate amount of the tax, "wages" does not include "the amount of any payment . . . made to, or on behalf of, an employee . . . on account of . . . sickness" Id. §3121(a)(2)(B).

If, as here, "more than the correct amount of tax imposed by section . . . 3111 [or] 3101 . . . is paid . . . proper adjustments . . . shall be made, without interest, in such manner and at such times as the Secretary or his delegate may by regulations prescribe." 26 U.S.C. §6413(a)(1). If the "overpayment cannot be adjusted . . . , the amount of overpayment shall be refunded in such manner . . . as the Secretary . . . may by regulation prescribe." 26 U.S.C. §6413(b).

The regulations regarding refund of overpayments of taxes collected under FICA contain no requirements that an

employer bring a claim on behalf of his employees in order to secure a refund of his own overpayment. The regulations do provide various methods by which employees and employers may recover payments. Regulation §31.6402(a)-2(a)(1), upon which plaintiff relies, provides in rather general terms that "[a]ny person who pays to the district director more than the correct amount of . . . [e]mployee tax under section 3101, or employer tax under section 3111 . . . may file a claim for refund of the overpayment" A second section of this regulation governs employers' claims for employees' overpayments, §31.6402(a) - 2(a)(2), and it is from this section that the IRS derived the conditions upon which it based its denial of the plaintiff's refund claim. Clearly, however, as the Government has now recognized, such conditions were inapplicable to plaintiff's claim, which expressly sought recovery of the employer's overpayments and not those of the employees. Another section of the regulation expressly authorizes suits by employees on their own behalf for credits or refunds. §31.6402(a)-2(b)(1) & (2). The regulation, while suggesting that an employer may claim refunds for overpayments of the employee's taxes, imposes no such requirement on the employer, and clearly contemplates claims brought individually by employers or by employees.

The other regulations relating to refunds or credits for overpayment, §§31.6413(a)-1 and 31.6413(a)-2, are not directly concerned with the main issue presented in this

case. Instead, they focus respectively on procedures to be followed in repaying employees for the erroneous overcollection of taxes and on the mechanics of adjusting overpayments. Neither of these provisions supports the Government's position that the employer should be obligated to claim a refund or credit on behalf of its employees as a precondition to securing a credit for its own overpayment.

The Government acknowledges the absence of a basis for its position in the language of the statute or the apposite regulations. Nevertheless, it urges the court to adopt its position on general policy or equitable grounds, arguing essentially that requiring the employer to claim an employee's overpayments as well as its own will assist employees in securing their deserved refunds while minimizing the administrative burdens placed upon the IRS. The Government also suggests that imposition of this responsibility on the employer is justified by the fact that such overpayments are generally caused by the employer's errors. These views are not without substance, but they cannot prevail.

In a field blanketed by elaborate and often highly technical regulations, the court should not in effect fashion new regulations for the agency derived from supposed grounds of policy that the agency itself did not perceive sufficiently either to formulate or even to state to the taxpayer before being brought to court. The Secretary of the Treasury, if persuaded of the soundness of the Government's position, can amend

the regulations to reflect his judgment. Short of such a decision, however, the Government will be held to the same obligation to adhere to duly enacted legislation and regulations as are taxpayers.

A final question arises from the statutory provision that a refund may be had only when the "overpayment cannot be adjusted" within the meaning of 26 U.S.C. §6413(a)(1). 26 U.S.C. §6413(b). Regulation §31.6413(a)-2(a) details the steps to be followed in effecting an adjustment. To make an adjustment of its own overpayment, an employer must first repay or reimburse each employee for the amount of the employee's overpayment,* and then claim credit for the amount of overpayment of both employer and employee tax in a subsequent return. A stipulation of the parties shows, first, that 89% of the original 2,409 employees of the plaintiff from whom excess FICA tax was withheld are no longer in plaintiff's employ, thus rendering reimbursement of the overpayment impossible, and, second, that the costs of locating and communicating with the employees entitled to repayment would average half or more of what plaintiff is claiming with respect to each employee. In sense and in law, such circumstances make this a case where the "overpayment cannot be adjusted."

In sum, plaintiff's motion for summary judgment is granted. The Government's motions are denied. The parties

will settle a final judgment.

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Dated: New York, New York
August 19, 1976

U. S. D. J.

- * 'Repayment' is cash payment of the overwithheld amount directly to the employee. 'Reimbursement' involves applying the overcollection against the employee's tax liability on a subsequent FICA return. See Regulation §31.6413(a)-1(b)(iii).

5-3582

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UNITED STATES DISTRICT COURT:
SOUTHERN DISTRICT OF NEW YORK

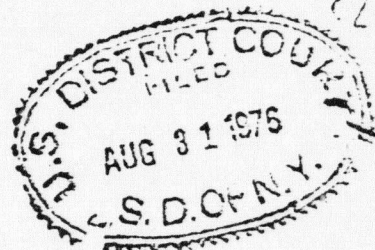
-----x
ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.
-----x



75 Civ. 4224 (MEF)

JUDGMENT

\$ 76,799

United States of America, defendant in the above action having moved for a judgment of dismissal on the pleadings or in the alternative for judgment dismissing the amended complaint for failure to state a claim upon which relief can be granted, pursuant to Rules 12(c) and 12(b)(6) of Federal Rules of Civil Procedure, and Atlantic Department Stores, Inc., plaintiff, having cross-moved for an Order pursuant to Rule 56 of Federal Rules of Civil Procedure, for summary judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint, on the ground that there are no genuine issues as to any material fact, and that plaintiff is entitled to judgment as a matter of law, and said motions having come on to be heard before this Court on May 27th, 1976, and this Court having filed its opinion dated August 19, 1976, it is

ORDERED, that plaintiff's motion for summary judgment be and the same hereby is granted, and it is further

ORDERED that defendant's motions for judgment on the pleadings or dismissal for failure to state a claim upon which

relief can be granted, be and the same hereby are denied, and it is further,

ORDERED, ADJUDGED and DECREED that plaintiff, Atlantic Department Stores, Inc. do recover from the defendant, United States of America, the sum of \$11,636.10, with interest thereon at 6% per annum, from the dates of the receipt by the said defendant, United States of America of each overpayment by the plaintiff of employer's tax under the Federal Insurance Contributions Act for the calendar year 1974.

Dated: New York, N.Y.
August 31, 1976

Maurice S. Roubel

U.S.D. J.

7211

JUDGMENT ENTERED - 8/31/76

Raymond F. Burghardt
CLERK

A TRUE COPY
RAYMOND F. BURGHARDT

A. Harrison

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ATLANTIC DEPARTMENT STORES, INC., :
Plaintiff-Appellee, :
-v- :
UNITED STATES OF AMERICA, :
Defendant-Appellant. :
----- x

Filed
10/28/76
mfb

NOTICE OF APPEAL
75 Civ. 4224 (MLF)

SIRS:

PLEASE TAKE NOTICE that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment (#76,799) of the United States District Court for the Southern District of New York (Honorable Marvin E. Frankel) dated August 31, 1976 and filed with the District Court on August 31, 1976.

Dated: New York, New York
October 28, 1976

FPS:ka
75-2931

A 40

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant
United States of America

By: Frederick P. Schaffer
FREDERICK P. SCHAEFFER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
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Telephone: (212) 791-1973

TO: KAPLAN & ABRAHAMS, ESQS.
200 Garden City Plaza
Garden City, New York 11530

United States Court of Appeals
for the 2nd Circuit
U. S. Courthouse, Foley Square
New York, New York 10007